Supreme Court

of the

United States

October Term, 1976

No. 76-617

JEFFREY RICHARD ROBBINS, *Petitioner*,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The unpublished opinion of the Court of Appeal of the State of California, First Appellate District, Division Four, filed on June 1, 1976, vacated and refiled on June 30, 1976, and modified on denial of petition for rehearing on July 22, 1976, is appended to the Petition for Writ of Certiorari.

On September 15, 1976, the California Supreme Court denied pentitioner's application for a hearing without opinion.

JURISDICTION

Petitioner would invoke this Court's appellate jurisdiction under Title 28, United State Code sections

2101 and 2104. Jurisdiction is conferred by Title 28, United States Code, section 1257(3).

QUESTIONS PRESENTED

1. Whether *Faretta v. California,* 422 U.S. 806 (1975), is to be applied retroactively.

2. Whether a rational suspicion, rather than probable cause, authorizes detention of a motorist for a traffic violation.

3. Whether police are required to "Mirandize" an accused who is not questioned.

4. Whether the state court's refusal to relitigate petitioner's motion to suppress illegally seized evidence denied a full and fair hearing on Fourth Amendment claims.

5. Whether the state may constitutionally prohibit possession and transportation of marijuana in a commercial context.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendments Four, Five, Six and Fourteen, section 1.

STATEMENT OF THE CASE

The District Attorney of Solano County accused petitioner Jeffrey Robbins of possession, possession for sale, and transportation of marijuana and of

driving under the influence of a drug, by an information filed on January 23, 1975 (CT 8-9).[1] Petitioner pleaded not guilty (CT 11), was tried by a jury (CT 13), and convicted of possession, possession for sale, and transportation of marijuana, but acquitted on the remaining charge (CT 48-49).

Proceeding eastbound on Interstate Route 80 at 1:45 a.m. on January 5, 1975, California Highway Patrol Officer DePue noticed petitioner driving in the same direction along parallel Nelson Road (RTS 4-5). As DePue observed petitioner at a distance of about one tenth of a mile (RTS 5), Robbins twice crossed the center line of the roadway (RTS 6). Approaching a curve, petitioner's automobile drifted into the oncoming lane the full width of the vehicle, its right wheels reaching the center line (RTS 6). Robbins returned his auto to the right side of the road but while negotiating the curve drifted three feet across the center line (RTS 6-7). DePue also noted that petitioner was driving 30 miles per hour in what DePue thought was a 55 miles per hour zone (RTS 6). Judging petitioner's driving to be erratic, DePue and Sergeant Stoltz followed and stopped him "to determine why it had left—was operating outside of a marked road lane." (RTS 7).

Petitioner immediately alighted, meeting DePue midway between their vehicles (RTS 8). The officer asked for Robbins' operator's license and ownership

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[1] "CT" refers to the Clerk's Transcript on Appeal; "RTS" refers to the Reporter's Transcript of the Suppression Hearing; "RT" refers to the Reporter's Transcript of trial proceedings.

registration (RTS 9).[2] Petitioner, perspiring profusely, swallowing rapidly, his eyes bloodshot and watery, experienced difficulty in removing the license from his wallet (RT 39-40). When Robbins opened his car door to retrieve his registration, DePue, standing three to four feet behind him, smelled the familiar odor of burned marijuana within the vehicle (RTS 9-10; RT 40-42). The officer also noted smoke in the car's interior (RT 43).

DePue then pat searched Robbins for weapons (RT 42; RTS 10), finding only a vial of malodorous liquid (RTS 11, RT 43). DePue next entered the passenger compartment to recover a pair of tweezers observed on the front seat (RT 43, RTS 12). The patrolman previously had observed such devices used to hold marijuana roaches (RT 43). After Robbins vomited (RT 44; RTS 12), DePue reentered petitioner's auto and found two pairs of tweezers on the dashboard, one with a burned hand rolled cigarette butt, and a cookie tin on the rear floor (RT 44-45, 47). Inside the tin were two packs of cigarette papers and a plastic baggie containing marijuana (RT 48, 145).

While Officer DePue searched the passenger compartment, petitioner remarked to Sergeant Stoltz

[2]California Vehicle Code section 4454 requires owners to maintain the registration or a facsimile copy in their vehicle. Vehicle Code section 2804 authorizes California Highway Patrol officers, "upon reasonable belief that any vehicle is being operated in violation of any provisions of this code" to "require the driver of the vehicle to stop and submit to an inspection of the . . . registration card." Vehicle Code section 12951 obliges a driver to carry his license while driving and to present it upon demand of a peace officer enforcing traffic regulations.

"What you are looking for is in the back" (RT 120). Stoltz repeated this to DePue. Robbins was placed in the patrol vehicle while DePue unlocked the back of Robbins' station wagon, raised the floorboard and removed two marijuana bricks and a tote bag containing some 30 pounds of marijuana (RT 50-53, 140). Inspector Grundy of the Solano County Drug Abuse Bureau placed the street value of the seized contraband at approximately $8,000.00 (RT 190), a quantity sufficient to supply an individual user for 17 years (RT 189).

About ten minutes after the contraband was discovered Robbins was advised of his *Miranda* rights (RTS 21; RT 58). He was not interrogated by the arresting officers (RT 58). Prior to the admonition petitioner told DePue he did not wish "to take a fall for this," (RT 58), and asked Stoltz what it would take "to get out of this?" The sergeant replied that disposition would follow booking. Robbins said "In my left pocket, check it." Petitioner's left pocket contained $521.00 (RT 122).

ARGUMENT

I

PETITIONER WAS NOT IMPROPERLY DENIED HIS SIXTH AMENDMENT RIGHT OF SELF-REPRESENTATION

On April 25, 1975, the fourth day of trial, petitioner sought to dismiss retained counsel (RT 316). As he did not seek to substitute other counsel, petitioner apparently recognized that "I would have to

continue my defense." (RT 322). The trial judge denied the motion as untimely (RT 320-321). The jury convicted Robbins on May 1, 1975 (CT 48-49), and the court sentenced him on May 30, 1975 (CT 67, 70).

One month later this Court announced its decision in *Faretta v. California,* 422 U.S. 806 (1975). On appeal petitioner contended that the trial court had denied his Sixth Amendment right of self-representation, recognized in *Faretta.* The intermediate state appellate court rejected his contention on the authority of *People v. McDaniel,* 16 Cal.3d 156, 168 (1976), in which the California Supreme Court limited the application of *Faretta* to state trials beginning after June 30, 1975. Appendix to Petition, 2a.

Petitioner asks this Court to overturn his conviction by giving *Faretta* retroactive effect. Petition, 6-9. He must fail for several reasons: *Faretta* should apply only prospectively to trials commenced after June 30, 1975, the date of that decision; retroactive application of the *Faretta* rule would not avail petitioner because his request for self-representation, if not equivocal, was untimely, and because the record affirmatively demonstrates that, while competent to stand trial, petitioner lacked the mental ability to defend himself.

A. Faretta v. California should not be applied retroactively.

Although *Faretta* found the right of self-representation implicit in the structure of the Sixth Amendment, 422 U.S. at 819, petitioner correctly perceives that its application is to be determined according to

the criteria elaborated in *Stovall v. Denno,* 388 U.S. 293, 297 (1967). Petition, 6. The question is not what the Sixth Amendment has always meant but to what extent it has been made applicable to the States by the Fourteenth Amendment. Sixth Amendment provisions have been selectively incorporated. *Duncan v. Louisiana,* 391 U.S. 145, 148 (1968). Where the reliability of the fact-finding process has thereby been enhanced, application of a specific Sixth Amendment right has been made retroactive. *E.g., Arsenault v. Massachusetts,* 393 U.S. 5 (1968); *McConnell v. Rhay,* 393 U.S. 2 (1968); *Roberts v. Russell,* 392 U.S. 293, 295 (1968); *Pickelsimer v. Wainwright,* 375 U.S. 2 (1963). Where that purpose would not be measurably served, however, application of an explicit Sixth Amendment right—trial by jury—has been made prospective. *DeStefano v. Woods,* 392 U.S. 631, 635 (1968).

The Court made clear in *Faretta* that it was deciding for the first time that "the Constitution forbids a state from forcing a lawyer upon a defendant. . . ." 422 U.S. at 815. Accord, *People v. McIntyre,* 364 N.Y.S.2d 837, 842, 342 N.E.2d 322, 325 (1974). Accordingly, the retroactivity or nonretroactivity of *Faretta* is not governed by the language or history of the Sixth Amendment but by these criteria:

> "(a) The purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Stovall v. Denno,* 388 U.S. 293, 297 (1967). Ac-

cord, *Halliday v. United States,* 394 U.S. 831, 832 (1969); *Tehan v. Shott,* 382 U.S. 406, 410 (1966).

"Foremost among these factors is the purpose to be served by the new constitutional rule." *Desist v. United States,* 394 U.S. 244, 249 (1969). Accord, *Gosa v. Mayden,* 413 U.S. 665, 679 (1973) (opinion of Mr. Justice Blackmun). New rules have been made retroactive regardless of good-faith reliance upon prior law and their impact upon the administration of justice where the " 'major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials. . . .' " *Adams v. Illinois,* 405 U.S. 278, 280 (1972) (opinion of Mr. Justice Brennan), quoting *Williams v. United States,* 401 U.S. 646, 653 (1971). *E.g., Roberts v. Russell,* 392 U.S. 293, 295 (1968); *Jackson v. Denno,* 378 U.S. 368 (1964). On the other hand, retroactivity has been denied where the Court has been unable to conclude that the newly proscribed practice of the past "presents substantial likelihood that the results of a number of those trials were factually incorrect. . . ." *Williams v. United States, supra,* 655 n.7. *E.g., Mackey v. United States,* 401 U.S. 667, 675 (1971); *Desist v. United States, supra.*

Assuring the reliability of criminal convictions was not the purpose of *Faretta;* it was the price paid for preserving individual autonomy. See 422 U.S. at 834. The Court acknowledged that "in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts," and that only in "rare instances" might an accused's efforts conceivably surpass his attorney's. *Ibid.* Reliable verdicts, and community acceptance of verdicts, are not enhanced by making retroactive the constitutional right to make a fool of oneself. Where the new rule does not guarantee "the very integrity of the fact-finding process" and, consequently, there exists no "clear danger of convicting the innocent," retroactivity is inappropriate. *Johnson v. New Jersey,* 384 U.S. 719, 728 (1966). *Faretta* impairs rather than improves the fact-finding process. Retroactive application of *Faretta* would be irreconcilable with decisions extending the right to counsel retroactively. *E.g., Arsenault v. Massachusetts,* 393 U.S. 5 (1968); *McConnell v. Rhay,* 393 U.S. 2 (1968); *Pickelsimer v. Wainwright,* 375 U.S. 2 (1963).

As if to illustrate the pitfalls of self-representation petitioner, who appears before this Court *pro se,* overlooks favorable precedent. In *People v. Holcomb,* 235 N.W.2d 343, 347 n.7 (Mich. 1975), a divided Michigan Supreme Court accorded *Faretta* "full retroactive effect" "unless and until the United States Supreme Court limits the application of that right" because

> "To deny retroactive effect to the right to proceed *pro se* on the ground that the right to counsel at trial enhanced the reliability of the fact-finding process while the right to proceed *pro se* inhibits or lessens the probability that the defendant's case will be adequately presented would be to reject the premise of *Faretta.* . . ."

And compare Hamilton v. State, 351 A.2d 153 (Md.Ct.Spec. App. 1976).

In concluding that the right of self-representation was too basic to be limited in time, the Michigan majority failed adequately to consider two fundamental principles governing retroactivity: (1) " 'the Constitution neither prohibits nor requires retrospective effect,' " *Robinson v. Neil,* 409 U.S. 505, 507 (1973), quoting *Linkletter v. Walker,* 381 U.S. 618, 629 (1965), and (2) "the choice between retroactivity and nonretroactivity in no way turns on the value of the constitutional guarantee involved." *Johnson v. New Jersey,* 384 U.S. at 728. This misapprehension, leading to a total failure to consider the impact upon the administration of justice of the retrospective application of *Faretta,* renders *Holcomb* unpersuasive.

Since denial of self-representation does not necessarily deny a fair trial, 422 U.S. at 837 n.2 (dissenting opinion of Chief Justice Burger); *People v. Sharp,* 7 Cal.3d 448, 460, 499 P.2d 489, 496 (1972), and since *Faretta's* purpose clearly favors nonretroactivity, the issue may be resolved without resort to the remaining factors of state reliance and the burden on the administration of justice. *Michigan v. Payne,* 412 U.S. 47, 55 (1973). However, both factors favor prospectivity.

California's view that the Sixth Amendment did not guarantee the right of self-representation was "justified," *DeStefano v. Woods,* 392 U.S. at 635, and of "unquestioned legitimacy," *Tehan v. Shott,* 382 U.S. at 417, since this Court had "not hinted at a

contrary view for 185 years," *Faretta v. California,* 422 U.S. at 835 (dissenting opinion of Chief Justice Burger). Indeed, the *Faretta* majority conceded "a strong argument can surely be made that the whole thrust of those decisions [extending the right to counsel] must inevitably lead to the conclusion that a state may constitutionally impose a lawyer upon even an unwilling defendant." 422 U.S. at 833. California accepted that argument. *People v. Sharp,* 7 Cal.3d at 454-55, 499 P.2d at 492-93. "Under these circumstances, judicial reliance on prior law was certainly justifiable." *Michigan v. Payne,* 412 U.S. at 56.

Petitioner insists that California's reliance upon the old standard was unjustified because *Adams v. United States, ex rel McCann,* 317 U.S. 269 (1942), clearly foreshadowed *Faretta.* Petition, 8. This argument is answered in *Faretta,* 422 U.S. at 814-815:

> "The *Adams* case does not, of course, necessarily resolve the issue before us. It held only that 'the Constitution does not force a lawyer upon a defendant.' *Id.* at 279. Whether the Constitution forbids a State from forcing a lawyer upon a defendant is a different question." (Footnote omitted).

Petitioner next asserts that reliance upon the former constitutional rule is limited to a "few" "recalcitrant" jurisdictions. Petition, 8. It is true that a number of state constitutions, like California's, arguably authorize *pro se* representation. Comment, 59 Calif.L.Rev. 1479, 1494 (1971); A.B.A. Standards Relating to the Function of the Trial Judge, p. 85 (approved draft, 1972); *People v. Sharp,* 7 Cal.3d at 457,

499 P.2d at 494-495. The extent of reliance upon laws conflicting with *Faretta* cannot be gauged simply by reference to state constitutional texts, however. "In practice, . . . state courts have so restricted the right that it becomes as difficult for a state defendant to represent himself as for a federal defendant." Comment, 59 Calif.L.Rev. at 1494.

Retroactive application of *Faretta* would adversely affect the administration of criminal justice. Whatever the number of retrials thereby necessitated, each would mock justice. Some defendants, having overturned their convictions because they were denied self-representation, would accept counsel on retrial. Other defendants would defend themselves, too often with the undesirable consequences foreseen in *Faretta*. 422 U.S. at 834 n.46. Many, whose guilt was reliably determined, simply could not be retried.

> "The effect on the administration of justice would be traumatic. Any defendant who at one time requested to represent himself on the record in a state court criminal proceeding could file for a new trial and under the rationale of *United States v. Price,* [474 F.2d 1233 (9th Cir. 1973)], no prejudice need be shown, only an unequivocal demand." *Houston v. Nelson,* 404 F.Supp. 1108, 1115 (C.D.Cal. 1975).

Contrary to petitioner's assumption, retroactive application of *Faretta* would comprehend more than a few defendants in a few states. Petition, 8-9. Beyond constitutionalizing the right of self-representation, *Faretta* set forth at least one standard for its implementation: The accused's "technical legal knowledge, as such, . . . [is] not relevant to an assessment of his knowing exercise of the right to defend himself." 422 U.S. at 836. In jurisdictions recognizing self-representation as a statutory or constitutional right it is certain that trial judges frequently insisted upon counsel by reason of the defendant's total ignorance of the law. Convictions in those cases would be invalidated by retroactive application of *Faretta.*

As Mr. Justice Blackmun emphasizes, the contours of the *Faretta* right remain largely undefined. 422 U.S. at 852. Depending upon forthcoming answers to questions posed in the Justice's dissent, retroactive application of *Faretta* could affect additional convictions. Virtually every existing federal and state conviction would be jeopardized by an affirmative response to Mr. Justice Blackmun's question "Must every defendant be advised of his right to proceed *pro se?*" *Ibid.*

Prospectivity at once preserves convictions of unquestionable reliability and affords the Court the greatest latitude in defining the right of self-representation. *Jenkins v. Delaware,* 395 U.S. 213, 218 (1969). Non-retroactivity is also warranted by the opportunity of pre-*Faretta* defendants to show that, in the peculiar circumstances of their cases, denial of self-representation deprived them of fair trials. *People v. Sharp,* 7 Cal.3d at 460, 499 P.2d at 496; *Houston v. Nelson,* 404 F.Supp. at 1115. *Compare, Michigan v. Payne,* 412 U.S. at 55; *Stovall v. Denno,* 388 U.S. at 299, and *Johnson v. New Jersey,* 384 U.S.

at 730, declaring that survival of due process claims further justifies non-retroactivity.

B. Petitioner's request for self-representation was untimely.

On the fourth day of trial petitioner attempted to dismiss his attorney. He did not seek a continuance or to substitute another lawyer (RT 316-324). When defense counsel suggested a motion for mistrial petitioner exclaimed "No, I would have to continue my defense." (RT 322). The trial court refused to permit counsel's withdrawal because "This is not a timely motion." (RT 320-321). Petitioner was convicted several days later.

Assuming, *arguendo,* that petitioner's was an unequivocal assertion of the right of self-representation, his request was properly denied as untimely. Having attached the right to self-defend to the Federal Constitution, *United States v. Plattner,* 330 F.2d 271, 273 (2d. Cir. 1964), the United States Court of Appeals for the Second Circuit observed in *United States ex rel. Maldonado v. Denno,* 348 F.2d 12, 15 (2d. Cir. 1965):

> "Once the trial has begun with the defendant represented by counsel, however, his right thereafter to discharge his lawyer and to represent himself is sharply curtailed. There must be a showing that the prejudice to the legitimate interests of the defendant overbalance the potential disruption of proceedings already in progress, with considerable weight being given to the trial judge's assessment of this balance."

In *Faretta* the Court noted that "well before the date of trial, . . . *Faretta* requested that he be permitted to represent himself." 422 U.S. at 807. Subsequently, the Second Circuit adhered to *Maldonado:*

> "The recent Supreme Court decision, *Faretta v. California,* . . . [citation] casts no pall on our *Maldonado* ruling. *Faretta* does not involve motions made after the commencement of trial and in that decision the Court cited (without disapproval) *Maldonado* which does." *Sapienza v. Vincent,* 534 F.2d 1007, 1010 (2d. Cir. 1976). Accord, *State v. Nix,* 327 So.2d 301, 354 (La. 1976).

Considering that the end of the trial was near, that the trial judge disagreed with petitioner's complaint of counsel's inadequacy (RT 320), and that petitioner fails to explain how continued legal representation prejudiced him, the trial court's ruling must be upheld.

C. The record affirmatively demonstrates that petitioner was not mentally competent to undertake his own defense.

When petitioner attempted to discharge his attorney, counsel requested a psychiatric assessment of his client's present capacity to stand trial (RT 316). Defense counsel voiced concern over petitioner's "screaming about guns" and his creation of a courtroom scene (RT 322). Petitioner, who later testified "I've been paranoid for 12 years," (RT 353), explained "I am honestly concerned for my own safety. A number of the gentlemen in the courtroom who are wearing coats that's pulled up to disguise firearms." (RT 322). He insisted on "all the individuals seated

in the audience, all the jurors having nothing on, so I don't get shot." (RT 322).

Pursuant to California Penal Code section 1368 the trial court thereupon appointed two psychiatrists to examine petitioner "to determine his capacity to understand the nature and purpose of the proceedings against him and to assist counsel in the conduct of his defense in a rational manner." See *Pate v. Robinson,* 383 U.S. 375 (1966).

Dr. Murray Eiland reported that while "there is a significant paranoid component to his thinking," petitioner was capable of continuing his trial (CT 19). Dr. Eiland testified to the same effect (RT 369, 375). Dr. H. E. McGrew found petitioner "a very bright, chronically disturbed young man who probably has a psychotic core but who is under fairly good control right now." (CT 20). Dr. McGrew detected "paranoid thinking," (RT 377), but, after "some reservations," concluded Robbins understood the proceedings and could cooperate with counsel (RT 378). See *Dusky v. United States,* 362 U.S. 402 (1959).

This Court has observed that "one might not be insane in the sense of being incapable of standing trial and yet lack the capacity to stand trial without benefit of counsel." *Massey v. Moore,* 348 U.S. 105, 108 (1954). Accord, *Westbrook v. Arizona,* 384 U.S. 150 (1966). Applicable to petitioner are remarks made about the accused in *Government of the Virgin Islands v. Niles,* 295 F.Supp. 266 (D.V.I. 1969):

> "The fact that he may be suffering from paranoia does not in this case mean that the defendant is unable to cooperate with counsel. . . As for defendant's competency to waive counsel, the court is of the opinion that one who may be suffering from paranoid delusions should not be entrusted with the sole conduct of his defense."

The reports and testimony of two alienists, petitioner's testimony and demeanor, and the expressed doubts of retained counsel affirmatively show that petitioner could not competently waive counsel in order to represent himself.

II.

HIGHWAY PATROL OFFICERS PROPERLY DETAINED PETITIONER AFTER HE DROVE INTO THE ONCOMING LANE

Petitioner complains that California has improperly extended the Court's holding in *Terry v. Ohio,* 392 U.S. 1 (1968), to authorize detention of a motorist upon a rational suspicion that he has violated traffic laws. "No such police authority, to make highway stops in the middle of the night to investigate erratic driving . . . is needed for the enforcement of the vehicle laws," petitioner insists. Petition, 10. "Absent probable cause, exigent circumstances or some paramount government interest, [citations], police intrusions on the right of the motorist to be let alone are vexatious and offensive to our notions of individual freedom." Petition, 10-11. To permit detention upon a mere rational suspicion that the motorist has violated traffic laws encourages police "to escalate the investigation into other more substantial criminal areas." Petition, 11.

On the contrary, California has carefully limited the power of the police in the context of a traffic violation.

> "An investigation relating to the detention required to issue a warning or citation for a minor traffic or vehicle equipment violation is limited in scope. The officer may require the driver to identify himself, produce his driver's license and the registration certificate for the vehicle, and he may interrogate with respect to the violation or violations which he has observed. Absent some suspicious circumstances, he may not search the driver or the vehicle [citations], and he may not conduct an exploratory interrogation designed to elicit incriminating information wholly unrelated to the matter at hand. [citations]." *People v. Grace,* 32 Cal.App.3d 447, 452-53, 108 Cal. Rptr. 66, 69 (1973). Accord, *Willett v. Superior Court,* 2 Cal.App.3d 555, 83 Cal.Rptr. 22 (1969). *And contrast People v. Brisendine,* 13 Cal.3d 528, 531 P.2d 1099 (1975), and *People v. Norman,* 14 Cal.3d 929, 538 P.2d 237 (1975), *with United States v. Robinson,* 414 U.S. 218 (1973), and *Gustafson v. Florida,* 414 U.S. 260 (1973).

Petitioner's detention was proper under any standard. Officer DePue twice observed Robbins steer his automobile into the oncoming traffic lane. Except in specified situations not pertinent here, California Vehicle Code section 21650 requires that "Upon all highways a vehicle shall be driven upon the right half of the roadway. . . ." Nelson Road is a "highway" within the meaning of this statute. Calif. Veh. Code § 360. Beyond giving rise to a rational suspicion or a

reasonable belief that a violation had occurred, petitioner's conduct constituted an offense committed in the officers' presence. Accordingly, petitioner was subject to citation for an infraction: violation of Vehicle Code section 21650. Calif. Veh. Code § 40000.1. The power to cite necessarily implies the power to detain and identify. Moreover, an automobile driving into an oncoming lane on a foggy night is an exigent circumstance which the State has a paramount interest in preventing.

III

THE OFFICERS WERE NOT OBLIGED TO ADVISE OF HIS RIGHTS AN ARRESTEE WHOM THEY NEVER INTERROGATED.

Petitioner contends that whether or not police interrogate a suspect, at the moment of arrest they are obliged to advise him of his constitutional rights in accordance with *Miranda v. Arizona,* 384 U.S. 436 (1966). Absent an admonition, petitioner reasons, volunteered statements must be excluded to accomplish the purpose of *Miranda.* Petition, 11-14.

As the Court recently reiterated:

> "Our decision in *Miranda* set forth rules of police procedure applicable to 'custodial interrogation.' 'By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" *Oregon v. Mathiason,* 45 U.S. Law Week 3505 (1977).

The purpose of *Miranda* was to insulate the Fifth Amendment privilege against self-incrimination from the coercion inherent in police interrogation. 384 U.S. at 467. It is official questioning which creates the need and the duty to warn. "Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." 384 U.S. at 478. *Miranda's* purpose would not be subserved by the expansion of its rule suggested by petitioner.

Although petitioner urged essentially this point in the trial court (RTS 23-37), his failure to present the claim to the state appellate courts forecloses him in this Court. See *Tacon v. Arizona,* 410 U.S. 351, 352 (1973); *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969).

IV

DENIAL OF PETITIONER'S REQUEST TO REOPEN HIS SUPPRESSION MOTION DID NOT DENY HIM DUE PROCESS

California Penal Code section 1538.5 provides the exclusive preconviction remedy for suppressing evidence on grounds of illegal search or seizure.[3] Pursuant to the statute petitioner's suppression motion was heard and denied on March 24, 1975. On the opening day of trial and again during trial, petitioner sought to reopen his motion (RT 7, 200, 207). The trial court denied both requests as untimely, and characterized petitioner's offer of proof as inadequate (RT 8-9,

[3]Petitioner did move, unsuccessfully, to suppress evidence at his preliminary examination (RT 201-202).

208). Robbins argues that the court's failure to reopen the suppression hearing to consider newly discovered evidence deprived him of a full and fair hearing on his Fourth Amendment claims, thereby denying due process of law. Petition, 14-18.

The statute makes no provision for renewing a suppression motion at trial. The purpose of this omission is to compel litigation of search and seizure claims before trial, thus avoiding the necessity for mistrials, conserving judicial and jury time, and affording the prosecution an opportunity to obtain appellate review of adverse rulings. *People v. Superior Court,* 4 Cal.3d 605, 483 P.2d 1202 (1971). Plainly, this procedural rule vindicates a "substantial state interest." *Henry v. Mississippi,* 379 U.S. 443, 448-449 (1965).

However, Penal Code section 1538.5(h) provides that if "the defendant was not aware of the grounds for the motion, the defendant shall have the right to make this motion during the course of trial. . . ." Petitioner contends that by erroneously rejecting his claim of newly discovered evidence entitling him to another suppression hearing at trial, the court so misapplied state law as to violate the Federal Constitution.

The trial court ruled correctly because petitioner's evidence was not newly discovered but newly disclosed and because it was immaterial. At the suppression hearing and at trial Officer DePue stated he observed petitioner moving 30 miles per hour in a 55 miles per hour zone (RT 5, 6, RT 37, 65). At trial,

petitioner presented conflicting evidence to the effect that while part of Nelson Road was posted at 55, while observed by DePue he was on a curve posted at 30 or 35 (RT 239-240). Robbins' trial testimony discloses that he was well aware of this stituation at the time of his suppression hearing. While driving 30 to 35 miles per hour he testified, "I was operating in accordance with the suggested maximum safe speed, which I found to be high." (RT 249). Moreover, misapprehension of the speed limit by DePue could not have affected the legality of a traffic stop for driving into an oncoming lane.

Petitioner next claims that only after his suppression hearing did he learn that the vial of liquid found in his person, smelled and confiscated by the arresting officers, contained amyl-nitrate, a compound which allegedly could have affected the patrolmen's senses if inhaled in sufficient quantity. Petition, 17.

In fact, petitioner was permitted to elicit from DePue and Stoltz testimony that each took but a single whiff of the liquid and noticed no physical effects (RT 19, 23). A defense toxicologist generalized about the chemical's effects (RT 423, 458-466, 471-475), but was unable to predict the effect of one whiff upon a given individual (RT 466). Thus, petitioner's evidence was no more probative than his offer of proof.

More important, his claim was irrelevant to Fourth Amendment issues. Neither officer was exposed to the amyl-nitrate until after both observed Robbins' erratic driving, stopped him, noted the familiar odor of

burned marijuana and pat-searched him (RTS 21-22, 23-25). The accuracy of the highway patrolmen's observations to that point is confirmed by petitioner's admissions that "it is entirely possible that I did cross the road markings," (RT 250, 297) and that a passenger had been smoking marijuana in his station wagon one hour earlier (RT 297). Each of the officers' subsequent observations occurred after probable cause for arrest existed and was embodied in physical evidence introduced at trial.

Petitioner asserts that he used the vial of amyl-nitrate to improve his auto engine performance. Petition, 15; RT 328-329. But the trial judge could have discredited his professed pretrial ignorance of the chemical's effect on human perception by reason of petitioner's trial testimony that "I understand it can be used to heighten sexual orgasm." (RT 481).

The trial court did not deny due process by refusing to consider evidence (1) apparently known to petitioner at the time of his suppression hearing and (2) immaterial to the resolution of his search and seizure claims.

V

THE STATE MAY CONSTITUTIONALLY PROHIBIT THE POSSESSION, TRANSPORTATION, AND SALE OF MARIJUANA

State and federal statutes outlawing marijuana are unconstitutional, petitioner contends, because "laws regulating its use, transportation and sale have no rational relationship to a justifiable state end." Peti-

tion, 20. While Robbins thus appears to invoke Fourteenth Amendment due process, his citation of *Ravin v. State,* 537 P.2d 494 (Alaska, 1975), and *Stanley v. Georgia,* 394 U.S. 557 (1969), suggests additional reliance upon the notion that regulation of marijuana violates a right of privacy not yet discovered in the Federal Constitution.[4]

Preliminarily, we note that petitioner asks the Court to resolve "medical, psychological and moral issues of considerable controversy in America," *United States v. Kiffer,* 477 F.2d 349, 352 (2d. Cir.), *cert. denied,* 414 U.S. 831 (1973), upon a barren record. Unlike *Ravin,* in which expert testimony was produced in the trial court, 537 P.2d at 504, petitioner did not properly present this claim or any evidence to the state courts. See *Tacon v. Arizona, supra; Cardinale v. Louisiana, supra.*

The argument that there no longer remains any rational basis for prohibiting the use of marijuana has been rejected by federal and state courts. "[A] holding that a legislative enactment is invalid cannot rest upon a judicial determination of a debatable medical issue." *United States v. Thorne,* 325 A.2d 764 (D.C.

[4]Although petitioner does not invoke the Eighth Amendment, his plaintive cry that he has been "sentenced to five years to life in San Quentin prison for this possession and transportation of the vegetable, marijuana," Petition, 18, evokes response. First, petitioner was previously convicted in federal court for sale of heroin. (CT 66). Second, petitioner's term is presently a matter of speculation, the statutes under which he was convicted having been amended to provide for a four year maximum term. 1976 Stats. Ch. 1139, §§ 71, 73, and 74. The repealing law, unless modified by the Legislature, will become operative July 1, 1977 with general retroactive effect. See *People v. Reece,* 66 Cal.App. 3d 96, 135 Cal.Rptr. 754 (1977).

App. 1974). "This is a legislative function and we leave it to the Legislature to determine whether in its wisdom a change in or repeal of existing laws is warranted." *People v. Aguiar,* 257 Cal.App.2d 597, 603, 65 Cal.Rptr. 171, 175 (1968).

Petitioner's reliance upon *Ravin* and *Stanley* is greatly misplaced. Robbins was convicted for possession, possession for sale, and transportation of over 30 pounds of marijuana on a California highway. His was a commercial enterprise, not a private home use. The zone of privacy protected by *Stanley* does not extend beyond the home. Contrary to the reasoning of the concurring and dissenting opinion of Justice T. G. Kavanaugh in *People v. Lorentzen,* 194 N.W.2d 827, 834 (Mich. 1972), Petition, 22-23, the right to possess and use something within the home does not create a corresponding right to transport or distribute it. *United States v. Orito,* 413 U.S. 139, 141-143 (1973) (obscene material). The inapplicability of *Stanley,* of *Griswold v. Connecticut,* 381 U.S. 479 (1965), and of *Roe v. Wade,* 410 U.S. 113 (1973), Petition 21, to commercial marijuana activities has been noted in *United States v. Horsley,* 519 F.2d 1264, 1265 (5th Cir. 1975), *cert. denied,* 424 U.S. 944 (1976), and in *United States v. Kiffer,* 477 F.2d at 352.

Nor does *Stanley* create a right of privacy encompassing use of marijuana in the home.

> "What we have said in no way infringes upon the power of the State or Federal Government to make possession of other items such as narcotics . . . a crime." *Stanley v. Georgia,* 394 U.S. at 568, n. 11.

Possession of marijuana in the home "can under no factual or legal interpretation be classified as fundamental or implicit in the concept of ordered liberty." *Louisiana Affiliate of Nat'l Org. for Reform of Marijuana Laws v. Guste,* 380 F.Supp. 404, 407 (E.D.La. 1974), *aff'd* 511 F.2d 1400 (5th Cir.), *cert. denied,* 423 U.S. 867 (1975).

Ravin, far from being persuasive, illustrates, the weakness of petitioner's federal claim. Construing an express state constitutional guarantee of the right to privacy in a manner "consonant with the character of life in Alaska," 537 P.2d at 504, the Alaska court acknowledged that no such analogous federal right has been recognized, 537 P.2d at 502, and abandoned the well-established "rational basis" test in favor of a "close and substantial relationship" standard of its own design. Judicial repudiation of legislative judgments by application of increasingly sensitive standards of constitutional review is less appropriate in the federal context than within the state.

CONCLUSION

The state of the record warrants denial of the petition for a writ of certiorari. The state of the law regarding the retroactive or prospective application of *Faretta v. California, i.e.,* the existing conflict between states and the potential federal-state conflict within the Ninth Circuit, warrants granting certiorari limited to that question and affirmance by the

Court without further briefing or oral argument. *Cf. DeStefano v. Woods,* 392 U.S. 631 (1968); *Roberts v. Russell,* 392 U.S. 293 (1968).

Dated, March 4, 1977.

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